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case.

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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN D. SMITH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 52A04-0609-CR-487

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Judge
Cause No. 52C01-0502-FA-36 and 52C01-0603-FB-49

February 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Kevin D. Smith pleaded guilty to Dealing in Methamphetamine,¹ a class B felony, and Attempted Dealing in Methamphetamine,² a class B felony. The trial court sentenced Smith to consecutive terms of twenty years in prison, with ten years of the sentence for attempted dealing suspended to probation. Smith presents the following restated issues for review:

1. Did the trial court violate *Blakely v. Washington* with respect to Smith's enhanced sentence for dealing in methamphetamine?
2. Is Smith's aggregate sentence inappropriate in light of his character and the nature of his offenses?

We affirm in part, reverse in part, and remand.

On January 28, 2005, a search warrant was executed at the residence shared by Smith and his girlfriend, Amber Comp. Among other things, police seized thirteen and one-half grams of methamphetamine. Both Smith and Comp were arrested during the search. The State subsequently charged Smith under Cause Number 52C01-0502-FA-36 (FA-36) with: Count 1, dealing in methamphetamine as a class A felony (based on possessing three or more grams of methamphetamine with intent to deliver); Count 2, maintaining a common nuisance, a class D felony; Count 3, possession of marijuana, a class A misdemeanor; and Count 4, possession of paraphernalia, a class A misdemeanor. Within a week, one of his friends, Curtis Malave, bailed Smith out of jail by writing a "bad check" in the amount of \$9500.00. *Transcript* at 62. Upon Smith's release, Malave

¹ Ind. Code Ann. § 35-48-4-1 (West, PREMISE through 2006 2nd Regular Sess.).

² *Id.*; Ind. Code Ann. § 35-41-5-1 (West 2004).

and Smith immediately began to manufacture and sell methamphetamine to cover the check. They were apparently successful in this regard.

Thereafter, while out on bond in FA-36, Smith was charged with possession of marijuana in August 2005. The marijuana charge, however, was dismissed after Smith provided information to police regarding a methamphetamine lab in a church.

On March 18, 2006, while still out on bond, Smith and Comp attempted to manufacture methamphetamine in Malave's garage, where Smith had manufactured methamphetamine between ten and twenty times before. On this occasion, the manufacturing activities were being surveilled by police with Malave's assistance. When Smith received notice from a lookout that police were in the area, he immediately ran outside and unsuccessfully attempted to throw the contents of a pitcher into the river. The mixture, which contained anhydrous ammonia, was thrown into the air. This caused breathing problems for police officers at the scene. Upon his arrest, Smith initially denied involvement but confessed once he saw the videotape police had of his manufacturing activities. Smith informed police that he was an occasional user and was addicted to the manufacturing process and the money more than the drug itself. Smith admitted that he had been manufacturing and selling methamphetamine for the last two years.

As a result of his most-recent arrest, the State charged Smith in Cause Number 52C01-06-3-FB-49 (FB-49) with attempted dealing in methamphetamine, a class B felony. While in jail, Smith cooperated with police by providing information regarding other drug activity in the area. Smith also participated in a program at North Miami High

School where he spoke regarding the dangers of methamphetamine and, specifically, how the drug affected his life and the lives of those around him. Smith participated against the advice of counsel. At sentencing, the prosecutor agreed that Smith did an “eloquent job” and “made a difference” during the program. *Id.* at 80. Because of Smith’s post-arrest actions and remorse, the prosecutor lowered the class A felony dealing charge to a class B felony in FA-36.

Smith and the State entered into a plea agreement on July 7, 2006, pursuant to which Smith pleaded guilty to dealing as a class B felony in FA-36 and attempted dealing as a class B felony in FB-49. The remaining counts were dismissed and sentencing was left to the court’s discretion. By statute, however, the sentences imposed were required to be served consecutively. *See* Ind. Code Ann. § 35-50-1-2(d) (West, PREMISE through 2006 2nd Regular Sess.) (if a person commits another crime “while the person is released...on bond...the terms of imprisonment for the crimes shall be served consecutively”). At the conclusion of sentencing hearing on August 18, 2006, the trial court sentenced Smith as set forth above. Smith now appeals his sentence. Additional facts will be provided as necessary.

1.

Smith initially challenges the sentence imposed in FA-36. He contends the trial court violated his Sixth Amendment rights, as outlined in *Blakely v. Washington*, 542 U.S. 296 (2004), by enhancing his sentence for dealing in methamphetamine based on several aggravating circumstances that were disputed at sentencing and not supported by

jury findings.³ While he acknowledges that the trial court could properly consider his criminal history without a jury finding, Smith claims that this sole remaining aggravator does not support imposition of the maximum sentence.

“An aggravating circumstance is proper under *Blakely* when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted or stipulated by a defendant; or 4) found by a judge after the defendant consents to judicial fact-finding.” *Wright v. State*, 836 N.E.2d 283, 292 (Ind. Ct. App. 2005), *trans. denied*. In the instant case, Smith did not consent to judicial fact-finding.

With respect to FA-36, the trial court listed the following aggravating and mitigating circumstances in its sentencing order:

The Court finds the following aggravating circumstances: 1. Defendant’s prior criminal history. 2. The Defendant possessed a handgun while committing the offense. 3. The Defendant possessed Methamphetamine is [sic] the same household as a six year old child lived. The Court finds the following mitigating circumstances: 1. The Defendant has a minor child to support. 2. The Defendant did not insist on trial. The Court finds that aggravation outweighs mitigation and sentences the Defendant to the Indiana Department of Correction for 20 years.

Appendix at 16.

The second and third aggravators listed by the trial court were neither found by a jury nor admitted by the defendant. In fact, the State acknowledges on appeal that Smith disputed the facts supporting these aggravators at the sentencing hearing. Because these

³ Smith does not challenge the sentence imposed in FB-49 on *Blakely* grounds because that offense was committed after the post-*Blakely* legislative amendments to our sentencing statutes went into effect on April 25, 2005.

facts were never properly established, pursuant to *Blakely*, they cannot support the enhanced sentence. See *Haas v. State*, 849 N.E.2d 550 (Ind. 2006).

Thus, the only permissible aggravator is Smith's criminal history. In this regard, we observe that the trial court appears to have considered several instances of charged misconduct that did not result in conviction. When pronouncing the sentence, the trial court stated in relevant part:

I also have to look at your record. I went through when your mother was testifying and I see that beginning at the age of 12 you were creating problems in this community. At the age of 15 again you were in our probation department. At the age of 17 you were in on a theft, you were in on a Minor Consuming of Alcohol. At the age of 18, Illegal Possession of an Alcoholic Beverage. At the age of 18, Battery Resulting in Bodily Injury. At the age of 18, Conversion. Age of 19, Illegal Consumption of an Alcoholic Beverage. 19, Theft, 19, you were charged with Burglary, a Class B felony. Then we have a hiatus because you went way [sic] and you weren't causing trouble in the community. You were released and you were released on to probation and released early from probation at the age of 27. You duped your probation officer, you lied to him, you lied to him, you somehow weren't able to get caught in the use of marijuana and apparently you were using marijuana throughout that period of time. You were given alcohol treatment at the age of 18. You apparently were ordered into an/or participated in a level 2 drug and alcohol program and intensive out-patient drug and alcohol program. A chronic relapse program. You successfully completed them, bongo, age of 29 you're arrested and charged with Manufacturing, Dealing in Methamphetamine. Age of 30, ...you're out on bond, you're picked up on a Possession of Marijuana charge. And at the age of 31, once again you are arrested of Manufacturing Methamphetamine. I believe that probation has exhausted all of its possibilities with you. I don't know what else our probation department, anybody can offer you because more than half of your life, more than half of your life Kevin has been involved in the criminal justice system. I don't know what else we can do for you. Accordingly, I'm sentencing you pursuant to the recommendations of the probation department.

Transcript at 86-87. While each of Smith's contacts with the criminal justice system was relevant with regard to sentencing him in FB-49, due to *Blakely*, they cannot all be considered with respect to sentencing him in FA-36.⁴ To be sure, Smith has a juvenile and criminal history consisting of one juvenile true finding for theft and four convictions as an adult (two class C misdemeanors involving underage alcohol possession or use, one class D felony theft, and one class B felony burglary). With respect to Smith's criminal history, however, the trial court also listed three juvenile matters that were not adjudicated and three criminal charges that did not result in convictions. Our Supreme Court has stated that such incidents are "irrelevant under *Blakely* because only convictions are permissible as criminal history." *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). Certainly, Smith's criminal history is significant and constitutes an aggravating circumstance. We cannot say with confidence, however, that the trial court would have given this aggravator as much weight had the court limited its consideration as required by *Blakely*.

At the end of the day, certain aggravators and facts that support the sentence imposed in FA-36 may be found only by a jury and those that a judge may find are such that "we are unable to say with confidence that a maximum sentence is appropriate." *Haas v. State*, 849 N.E.2d at 556. We therefore remand to the trial court to allow the State, at its election, to prove the *Blakely* aggravators to a jury. See *Haas v. State*, 849

⁴ As our Supreme Court has stated in a different context: "Such is the *Blakely* world we live in." *Haas v. State*, 849 N.E.2d at 554 n.2.

N.E.2d at 550. Should the State decide to waive this opportunity, we direct the trial court to revise Smith’s sentence with respect to FA-36 to fifteen years.⁵

2.

Because we have remanded for resentencing with respect to FA-36, we need not address Smith’s claim that his aggregate sentence is inappropriate. We will address, however, the appropriateness of the sentence imposed in FB-49.

We have the constitutional authority to revise a sentence if, after consideration of the trial court’s decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. App. R. 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). “We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences.” *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

With respect to FB-49, Smith received the maximum sentence of twenty years, with ten of those years suspended to probation. We cannot say that this sentence is inappropriate in light of Smith’s character and the nature of the offense. While this appears to have been an otherwise run-of-the-mill attempt at producing methamphetamine with intent to deliver, it is important to recognize that the offense was

⁵ In addition to the mitigating circumstances and Smith’s criminal history, we are also mindful of Smith’s continued criminal actions following his arrest in FA-36. In this regard, Smith fully admitted that he had a friend bond him out of jail with a bad check, after which the pair manufactured and sold approximately \$10,000 worth of methamphetamine to cover the check. Smith admitted, further, that while on bond he was arrested for possession of marijuana, and he was later arrested for and charged with manufacturing methamphetamine in FB-49.

committed while Smith was out on bond for pending charges that included, among others, dealing in methamphetamine, as a class A felony. Further, Smith admitted that he had been manufacturing and dealing methamphetamine on a consistent basis for approximately two years.

Smith's juvenile and criminal history reveal that from a young age he has been regularly involved in criminal activity and undeterred by probation and even prison. While he appeared to respond well after his lengthy incarceration for burglary and subsequent period of probation, Smith acknowledged that he smoked marijuana while on probation but was never caught. Moreover, the record before us reveals that he began manufacturing/dealing methamphetamine soon after his release from probation, if not earlier. In fact, he was arrested and charged in FA-36 only seven months after the early termination of his probation. Still undeterred, Smith bonded out of jail with a bad check and then continued his drug activity immediately upon his release in order to cover the check. Smith's criminal history constitutes a substantial aggravating factor. *See Weiss v. State*, 848 N.E.2d 1070, 1073 (Ind. 2006) (“[defendant’s] repeated contacts with the criminal justice system have had no impact on persuading him to reform”).

In mitigation, Smith notes that he pleaded guilty, was remorseful, and participated in a program at the local high school. Initially, we note that Smith received a substantial benefit in return for his guilty plea and, therefore, it is not entitled to significant weight. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (“a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead

guilty is merely a pragmatic one”), *trans. denied*. Smith’s remorse and public address to students regarding the dangers of methamphetamine are certainly worthy of some consideration. The record reveals, however, that Smith received consideration for his participation in the community-outreach program when the State agreed to reduce the class A felony charge in FA-36 to a class B felony. Further, at least with respect to FB-49, Smith’s cooperation appears to have been the result of pragmatism and an attempt to reduce punishment for a crime that was plainly documented by police on videotape.

In light of the nature of the offense and Smith’s character, we conclude that the maximum sentence imposed by the trial court is not inappropriate, especially considering the fact that the court suspended half of the sentence to probation.

Judgment affirmed in part, reversed in part, and remanded.

KIRSCH, C.J., and RILEY, J., concur.